

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

**Retention by Broadcasters of
Program Recordings**

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) **MB Docket No. 04-232**
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**COMMENTS OF
HARVARD RADIO BROADCASTING CO., INC.**

Harvard Radio Broadcasting Co., Inc., an eleemosynary Massachusetts corporation, (“WHRB”), files these comments in response to the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding (“NPRM”). Station WHRB(FM) is a Class C FM station operated year-round on a volunteer basis by undergraduate students at Harvard College. WHRB(FM) is a member of the Intercollegiate Broadcasting System, which is also filing comments in this rulemaking proceeding.

In the NPRM, the Commission seeks comment on its proposal to require broadcasters to retain recordings of their broadcasts for a limited period of time. NPRM ¶¶ 1, 6. Specifically, the Commission proposes “requiring broadcasters to retain a recording of all material they air during the hours of 6 a.m. and 10 p.m., when children are likely to be in the audience, for a limited period of time.” NPRM ¶ 7. Among other things, the Commission seeks comment on the proper length of time a copy of programming should be retained by a licensee, the steps a broadcast station must take to comply with the proposed requirements, potential copyright issues raised by retention, the financial burden the proposals may impose, Commission policy for

handling public complaints of indecency and obscenity and the impact that retention rules may have on small broadcasters, NPRM ¶¶ 7, 9.

I. The Commission's Initial Regulatory Flexibility Analysis Does not Adequately Differentiate the Impact on Small, Educationally Affiliated Broadcasters.

The requirements of the Regulatory Flexibility Act, P.L. 95-354 (1981), as amended by the Debt Limitation Act, P.L. 104-121 (1996), Title II of which is known as the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C., ch. 6, are not satisfied as to this rulemaking proceeding by the Docket No. 04-232 notice. Section 603 (Initial regulatory flexibility analysis) of the Regulatory Flexibility Act, as amended, 5 U.S.C. § 603, requires that whenever an agency issues a notice of proposed rulemaking such as that published by the Commission on July 7th, "the agency shall prepare and make available for public comment an initial regulatory flexibility analysis."¹ Section 601 (Definitions) of the 1980 Act, 5 U.S.C. § 601, applies the requirements of the Act to all government "authorities" falling within the scope of Section 2(a) ("agency") of the Administrative Procedure Act of 1947, now 5 U.S.C. § 551(1). The Commission's Initial Regulatory Flexibility Analysis ("IRFA") does not meet the requirements of the Regulatory Flexibility Act because it does not differentiate educationally affiliated broadcasters from other small broadcasters.

II. The Proposal as to Small Educationally Affiliated Broadcasters Would Violate the Public Policy of the United States by Unnecessarily Burdening Such Stations.

Certain substantive limitations on the outcome of the NPRM are imposed by the Regulatory Flexibility Act, P.L. 95-354, as amended, enacted into positive law as 5 U.S.C., ch. 6. The public policy of the United States government, as declared in Congress in Section 2

(Congressional Findings and Declaration of Purpose) of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt, is to require that both governmental regulations and “informational requirements” differentiate in a meaningful way between large entities and small entities, so as “to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.”² Section 2(b) then “establish[es] as a principle of regulatory issuance that agencies shall endeavor ... to fit regulatory and informational requirements to the

¹ Such IFRA “shall describe the impact of the proposed rule on small entities” and shall be published in the Federal Register and transmitted to the Chief Counsel for Advocacy of the Small Business Administration.

² In Section 2(a) Congress “finds and declares that --

“(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

“(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

“(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

“(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

“(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

“(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

“(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

“(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.”

scale of the business, organizations, and governmental jurisdictions” subject thereto. The Commission, as an administrative agency, is bound by the public policy of the United States.

The proposed rules do not adequately take into consideration the “the scale of the business, organizations, and governmental jurisdictions” subject thereto. Neither do the proposed rules meet the Commission’s goal of “establish[ing] a retention period that is long enough to ensure that the recording will be available in response to a LOI, but not so long that it imposes unreasonable burdens³] on such licensees.” NPRM ¶ 7. As detailed in §III below, the proposed changes to the Commission’s rules impose unreasonable burdens on small non-profit broadcasters dependent on volunteer staffing.

III. The Costs in Terms of Hardware and Technical Labor for Complying With the NPRM Would Unduly Burden Small, Educationally-Affiliated Stations Such As WHRB.

WHRB estimates that compliance with the recording retention requirement would require a onetime outlay of \$700 for startup hardware costs and 25 hours of technical labor. Maintenance of such a system would necessitate \$200 of hardware replacements and 10 hours of technical labor annually. In addition, each request by the Commission for an audio transcript from the station’s retained archive would entail approximately 5 hours of technical labor to produce. §III(1) describes assumptions underlying these estimates for the construction of one possible system and §III(2) shows why this burden is unreasonable for a small, educationally-affiliated broadcaster such as WHRB.

³ In cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint, the FCC has held that the broadcasts occurred. *See, e.g., Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004). “Under such circumstances, broadcasters may find it in their interest to retain recordings for a longer period than the proposals above [60 or 90 days] suggest. ... [A] broadcast station may currently retain recordings on a voluntary basis in the absence of a mandate from the Commission.” NPRM ¶ 7, nt. 9.

1. Cost estimate for retaining 60 and 90 days of all programming aired on WHRB between the hours of 6 a.m. to 10 p.m.

WHRB has found no need to, and currently does not, record (*e.g.*, audio log) its signal. In addition, the station does not possess the technical equipment required to implement an audio logging system. Therefore, WHRB would be required to design and purchase a contained system to comply with the NPRM.

Before the advent of digital encoding (*e.g.* MP2, MP3, etc.) techniques and digital recording hardware (*e.g.*, computers, hard drives, *etc.*) the Commission's request to retain 960 and 1440 hours of audio (*e.g.*, 60 and 90 days of 6 a.m.-10 p.m. programming, respectively) would be extremely difficult in terms of human labor and blank media (*e.g.*, cassette tapes, blank reels, *etc.*). While digital storage and recording techniques make the job manifestly easier, the costs in terms of technical labor and equipment are not trivial⁴.

As suggested by the NPRM at paragraph 9, the Commission will allow "content to be recorded at a lower bit rate so that it is not as expensive to retain." WHRB urges the Commission to apply this standard to all required program retention. For an audio signal, WHRB assumes that a bitrate of 20 kbps in mono will be sufficient for the purposes of the NPRM.

The following hardware purchases and approximate costs would be required to set up a system for recording 960 and 1440 of non-contiguous (*e.g.*, only the hours of 6 a.m. to 10 p.m.) audio:

- i. A dedicated mid-range computer with processor speed sufficient to encode audio in real-time with audio card. Cost: \$500.

⁴ Many commercial stations employ "audio-skimming" hardware. These devices are glorified cassette recorders that retail from \$500 to \$2500 which automatically begin recording (*e.g.*, skimming) when the studio microphone is activated. While such a device is easy to operate, it is not capable of recording the scope of programming proposed by the NPRM.

- ii. Encoding/Recording software. Cost: approximately free to \$100 (depending on sophistication and specific choice).
- iii. Hard-drives. 960 hours of audio at 20 kbps/mono would require 8.2 gigabytes of storage space while 1440 would require 12.4 gigs. Cost: \$100.

Setting up the archiving system would require an outlay of technical labor. In addition to connecting the computer and completing the audio wiring required to place the system within the broadcast chain, software customization is needed. An engineer with skills in software scripting would be needed to automate the tasks of turning on/off the recorder at the appropriate hours, deleting out-of-date recordings, and other general maintenance tasks needed to ensure 24/7 operation of a dedicated computer. WHRB estimates these tasks require a onetime use of 25 hours of technical labor. At an industry average of \$85/hour for technical labor, the market rate for these services would be \$1700.

Maintenance in the form of hardware and labor would be required to insure the system remains operational. Given that the system's hard drive will be in continuous operation and the propensity for disk failure, it would be advisable to purchase 1-2 new hard drives annually. Combining this cost with an average lifespan of 3 years for dedicated computer equipment, we estimate the need for \$200 worth of hardware purchases annually to keep the archiving system in operation. Additionally, approximately 10 hours of technical labor is required for updating the computer's operating system and software each year at a market cost of \$850.

While it seems highly unlikely that an indecency or obscenity complaint would be received pertaining to WHRB's jazz and classical music daytime programming, we estimate that it would take an engineer 5 hours of technical labor to comply with a Commission request for an audio transcript from the archive. Steps would include isolating the alleged time period on a separate machine since the archiving system would be in dedicated operation, manually cutting the audio using a software tool and placing the transcript on a piece of physical media. The

market cost for this labor would be \$425/incident. The NPRM asks whether the established broadcast complaint process should be altered. Since each request for an audio transcript would cost the station \$425 in labor, we urge the Commission to continue to apply a probable cause benchmark to any complaint before issuing a request for transcript.

2. The hardware and labor costs associated with creating and maintaining an archiving system are unduly burdensome for educationally-affiliated stations.

WHRB is staffed entirely by undergraduates on a volunteer basis. In addition to the programming and business aspects of running a radio station, the staff is also responsible for the day-to-day operations of all technical equipment related to signal transmission, audio engineering and office support. The initial setup of an archiving system described in §III(1) would require a skilled computer engineer. Volunteer labor of this caliber is difficult to find as it commands a healthy market rate. While the station does not pay for labor, the \$1700 market-rate for setup labor should be seen as a real cost for our station in terms of lost labor for our regular operations.

Furthermore, there is no need to impose such requirements on educationally affiliated stations. There is nothing to indicate that such stations have been a prolific source of obscenity complaints. The need as to such stations is further attenuated by the Commission's own appraisal that "[m]any complainants are able to provide enough detail for us to determine that enforcement action is warranted, even if the licensee has no transcript or recording of the program to provide in response to an LOI." NPRM ¶ 6. In fact, for the period between 2000 and 2002, a period in which the Commission received 14,379 complaints covering 598 programs the Commission denied or dismissed only 169 (less than 1.2%) of those complaints for the lack of a tape, transcript, or significant excerpts. NPRM ¶ 6, nt. 8, citing Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004.

Given the burden imposed by the rules and the low incidence of complaints which are dismissed for lack of a recording, the Commission should, where a class of broadcasters is affiliated with an educational institution, exempt them from the recordation requirement.

IV. The Commission Should Not Impose Absolute Liability On the Licensee For Making and Preserving the Archive Recordings.

Dedicated computer equipment is by its nature unreliable. WHRB estimates that the system described in §III(1) would have an uptime of approximately 90%⁵. Factors which influence this estimate include software glitches, projected hard drive failure from continual use, potential overheating⁶ and acts of nature beyond our control. If the final version of the rule were to impose absolute liability on the licensee for the making and preserving of the recordings, then duplicative or triplicative equipment and labor would be necessitated, thereby proportionally increasing the cost-burdens of equipment and labor imposed by the rule from those described above. For example, an ideal system would include mirroring the archive at an off-site location via the use of a dedicated high-speed connection to the Internet or private network at a minimal cost of \$1000 per month. Other modifications would include total replication of the archive system itself and software customization geared toward automatic fail-safe switchovers. Since this work is exorbitantly expensive and beyond the scope of a small broadcaster's technical sophistication, WHRB urges the Commission to adopt a "good faith" clause in the event it decides to require programming retention for a specified amount of time.

⁵ Since WHRB lacks backup power, the uptime percentage is increased over a basic computer system since a power outage would knock both the station and archiving system offline, rendering the need for program retention moot.

⁶ As often noted by student volunteers, WHRB's broadcasting facilities lack air conditioning and computer equipment routinely fails during summer months.

V. The Commission Should Be Mindful of Possible Copyright Violations Incurred By Stations in Regard to Program Retention.

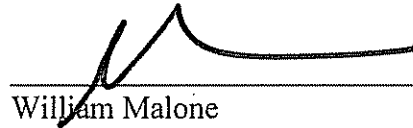
17 U.S.C. § 112 allows a broadcast entity to make up to one ephemeral recording of a copyrighted work for the sole purpose of facilitating its transmission. In its NPRM, the Commission is requesting radio stations to use this sole copy for the purpose of programming retention. During 95% of its broadcast, WHRB transmits in real-time over the air with the use of physical media (*e.g.* CDs, LPs, 7 inch records, *etc.*). However, during the summer months, the station sometimes pre-records blocks of programming and broadcasts them over the air from a computer system. Under this scenario, we would violate copyright law by archiving a second copy for purposes of programming retention. One alternative would be to allow us to hold the original, pre-broadcast ephemeral recording in lieu of a second archive. The downside would be that we could not certify that our archive is an exact match to what went out over the air.

WHRB does not see the potential for copyright violation as a stumbling block for implementing the NPRM at our station since we rarely preprogram our broadcast. However, most commercial stations broadcast exclusively from automated systems and could face major liabilities. WHRB also wishes to point out that ephemeral copies are not merely a theoretical issue to copyright holders. As seen in the recent Copyright Office ruling on webcasting, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261), it was determined that ephemeral copies of sound recordings have a market rate of 8.8% their licensed value. Therefore, the NPRM could increase music licensing fees by 8.8%, a substantial amount for many broadcasters.

CONCLUSION

For the reasons indicated above, the Commission should revise its RFA and should accordingly revise its proposed rules to reflect the special impact of the proposal on educationally affiliated broadcasters, dismiss the NPRM, or exempt the educationally affiliated broadcasters.

Respectfully submitted,



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